SUPREME COURT, U. S.

PETITION FOR CERTIORARI

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1045

MELVIN LLOYD MANLEY,
Petitioner.

v.

COMMONWEALTH OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Stanley E. Sacks
Filmore E. Rose
SACKS, SACKS & TAVSS
First & Merchants National Bank Building
Norfolk, Virginia 23510
Counsel for Petitioner

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COMMONWEALTH OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioner, Melvin Lloyd Manley, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia rendered in these proceedings on September 4, 1970.

OPINIONS BELOW

The decision of the Supreme Court of Appeals of Virginia denying petitioner's appeal and affirming judgment of conviction rendered by the Corporation Court, Part Two, of the City of Norfolk, Virginia, is embodied in an opinion reported at 211 Va. 146, 176 S.E.2d 309. The opinion appears at Appendix, *infra.*

JURISDICTION

The decision of the Supreme Court of Appeals of Virginia was entered on September 4, 1970. The jurisdiction of this Court is invoked under Title 28, U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether an affidavit given preliminary to the issuance of a search warrant is sufficient where the facts were all stated by an unidentified informant, who is only described therein as "a reliable informant" without containing any underlying circumstances as to his credibility or the reliability of his information.

2. Whether a search warrant is valid which attempts to describe an apartment in a building to be searched only with reference to the name of a person alleged to occupy said apartment where resort must be had to sources independent of the warrant in order to ascertain which apartment in a multiple unit building was to be searched.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

that in determining whether a State criminal conviction is constitutionally permissible because of the admission of evidence obtained as a result of an illegal search and seizure, State procedural requirements must be respected.

[2] Rule 1:8, Rules of Court, provides in part that all objections requiring a ruling or judgment of the trial court shall state with reasonable certainty the ground of objection, and unless it appears from the record to have been so stated, such objections will not be considered by this court. See *Fletcher* v. *Commonwealth*, 209 Va. 636, 640, 166 S.E.2d 269, 273 (1969).

An objection that a search warrant was not supported by an affidavit as required by statute cannot be raised for the first time on appeal from a conviction. See *Harlow* v. *Commonwealth*, 195 Va. 269, 273, 77 S.E. 851, 854 (1953); *Nicholas* v. *Commonwealth*, 186 Va. 315, 324, 42 S.E.2d 306, 311 (1947). See also *Frogg* v. *Commonwealth*, 163 Ky. 175, 173 S.W. 383, L.R.A. 1915D 330 (1915).

There is a general procedural requirement in most jurisdictions that if a defendant wishes to preserve his right to challenge on appeal the constitutionality of a search and seizure through which certain evidence has been obtained, he must take timely steps in the lower court, either through a motion to suppress the evidence before trial or by sufficient objection to the use of the evidence when offered at trial. *United States* v. *Gitlitz*, 368 F.2d 501, cert. denied 386 U.S. 1038, 87 S.Ct. 1492, 18 L.Ed. 2d 602, rehearing denied, 389 U.S. 908, 88 S.Ct. 210, 19 L.Ed.2d 227 (2d Cir. 1966); 29 Am.Jur.2d, Evidence, §§ 425, 426, at 481, 483. See also Annotations: 50 A.L.R.2d 531, §§ 11, 12, at 583, 592, and 30 A.L.R. 3d 128, § 10, at 178-84, and the numerous cases there collected.

Since the defendant did not raise the question of the authority of the justice of the peace to take the affidavit of the affiant-officer in the court below, it will not now be considered by us.

[3] Defendant says that the affidavit upon which the search warrant was issued was insufficient in that it did not state the underlying circumstances constituting probable cause for the issuance of the warrant, as required by the test set out in *Aguilar* v. *Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723 (1964), and later explained and referred to as a "two-pronged test" in *Spinelli* v. *United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

In *Aguilar* the test for determining probable cause in those many instances where the affidavit is based solely or substantially upon an

informer's tip was set forth as follows: (1) the affidavit must describe some of the underlying circumstances necessary to enable a neutral and detached magistrate to judge the validity of the informant's conclusion that the narcotics were where he claimed they were, and (2) the affidavit must describe some of the underlying circumstances from which the magistrate can determine that the affiant, officer or unnamed informant, whose identity need not be disclosed, was 'credible' or his information 'reliable.'

Clearly the affidavit in the instant case satisfies *Aguilar's* first requirement of the test. The informant's information was based on personal observation and participation in the defendant's illegal activity. The neutral and detached justice of the peace could thus conclude that the allegations were based on facts, not suspicion or rumor. *Spinelli, supra*, 393 U.S. at 416, 89 S.Ct. at 589, 21 L.Ed.2d at 643.

We next consider whether the affidavit meets the second requirement of the test, that of credibility or reliability.

Where the accuracy of the information received from a confidential informant is not supported by other sources known or stated to be accurate or from corroborated facts known or discovered by the affiant personally or from other official or reliable reports, the officer-affiant must present in his affidavit a substantial factual basis for crediting the informant's story.

A mere allegation that the affiant has "received information from a reliable informant" has been held insufficient to show that the informant was credible, or that his information was reliable. See *Riggan* v. *Virginia*, 384 U.S. 152, 86 S.Ct. 1378, 16 L.Ed.2d 431 (1966) (reversing 206 Va. 499, 144 S.E.2d 298).

The most commonly accepted and approved allegation to substantiate reliability is that the informer is a person of known and proven reliability and has furnished information to law enforcement officers which has been instrumental in procuring convictions. But the credibility of the informer or the reliability of his information may be shown in other ways. Reliability may be found in an informant's statement of facts as an "eyewitness." *McCreary* v. *Sigler*, 406 F.2d 1264, 1269, *cert. denied*, 395 U.S. 984, 89 S.Ct. 2149, 23 L.Ed. 2d 773 (8th Cir. 1969). In *People* v. *Montague*, 19 N.Y.2d 121, 278 N.Y. Supp.2d 372, 224 N.E.2d 873, *cert. denied*, 389 U.S. 862, 88 S.Ct. 116, 19 L.Ed.2d 130 (1967), the reliability standard was said to have been met where the affidavit in sufficient detail established

of the house. Tr. 56, and that one of them, the one on the left, had the name Melvin Manley on it. Exhibit D-6, a photograph, showed that there were two mailboxes on the front of the premises. Tr. 61. Mr. Carter, the owner, stated that to his knowledge the name "Melvin Manley" had never appeared on the mailboxes. The petitioner, Melvin Manley, testified that his name had never appeared on any mailbox of the premises. Tr. 81. Further, he testified that he had lived all of his twenty-six years at 1012 Hanson Avenue, Norfolk, Virginia, and produced certain personal papers to corroborate this fact. Ex. D-7; Tr. 79.

After arriving at the premises, the officers went to the second floor, made an inquiry of someone, then returned to the first floor where they knocked on the door of apartment one. The officers presented the search warrant to petitioner who had answered the door, and they entered and searched the apartment. The tenant of the apartment, Carole Speller, was present at the time of the entry and search. During the search the officers discovered a quantity of what was later determined to be marijuana, however, nothing was found in the chest or dresser drawer specified in the affidavit. Tr. 56.

At the commencement of the trial in the Corporation Court, Part Two, counsel for the defendant moved the Court to suppress the evidence of marijuana on the grounds *inter alia*, that the affidavit upon which the search warrant was issued did not state sufficient facts and circumstances to support the informant's conclusion that marijuana was where he said it would be or that the informant was credible or his information reliable, and that the search warrant was invalid in that the apartment to be searched was not sufficiently described therein. Tr. 83-118. This motion was overruled by the trial Court and an exception was noted by counsel for the defendant. Tr. 123. Petitioner was convicted of possession of narcotics by the Court without a jury, §54-488, Code of 1950, 1967 Repl. Vol., and was sentenced to four years in the penitentiary and fined five hundred dollars.

The same grounds presented for review before this Court were raised before the Supreme Court of Appeals of Virginia which affirmed the judgment of conviction entered by the trial Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Virginia Supreme Court of Appeals conflicts with prior decisions of this Court establishing requirements for affidavits upon which search warrants are issued.

The issue petitioner seeks to bring before the Court is whether the second part of the two pronged test established in *Aguilar v. Texas*, 378 U.S. 108 (1964), that an affidavit must supply some support for the affiant's claim that the informant was " 'credible or his information reliable'," may be satisfied by a declaration against interest made by an undisclosed informant. The Virginia Supreme Court of Appeals held that the reliability standard of *Aguilar and Spinelli v. United States*, 393 U.S. 410 (1969) was met by an affidavit which related the informer's

> "participation in defendant's illegal activity. His statements were admissions against interest. These facts certainly show a substantial basis for the officer - affiant to state that the informant was reliable and for a neutral and detached magistrate to conclude that the informant's information was reliable and that probable cause existed for the issuance of the warrant." 211 Va. at 151.

While the Court in *Spinelli* indicated that there may be situations where the reliability standard is met by sufficient detail in the affidavit to establish that the information supplied by an informant was obtained in a reliable way, *Draper v. United States*, 358 U. S. 307 (1959), the Court did not suggest that reliability may be shown merely by the informant's admission that he participated in other illegal activities

with the accused in order to buttress his conclusion that narcotics were on the premises. This case is distinguishable from *Draper* where the reliability of the detailed information could corroborated at the scene of the arrest by the fact that the suspect was dressed precisely according to the description given by the informant. This sort of independent corroboration is impossible where the reliability of the information supplied by an informer may only be proved after the fact by conducting a successful search.

Petitioner challenges the Virginia Court's assumption that a declaration against penal interest is inherently reliable and that such a declaration is sufficient to satisfy the *Aguilar* test. Even assuming that such declarations by either the informer himself or a person making a declaration against interest to the informer are sufficient to establish the validity of the informer's conclusion that narcotics would be found on the premises, as Mr. Justice White indicated they would be in his concurring opinion in *Spinelli v. United States,* 393 U.S. at 425, this does not mean that the information is thereby rendered any more reliable, or the informer more credible. The Court has not spoken as to how a declaration against interest affects an informer's "credibility" as distinguished from his logic.

Petitioner urges that the declaration against interest in the present case is not inherently reliable, but, to the contrary, is inherently suspect when made by the informer and does not provide a sufficient substitute for independent corroboration of the informer's information or for evidence of his previous reliability. A declaration against interest is considered an exception to the hearsay rule because common sense indicates that a person would not untruthfully subject himself to possible punishment, ridicule or humiliation by admitting to criminal activity. Such declarations are considered trustworthy because there is some risk associated with making the statement. See: McCormick, Law of Evidence,

Handbook, §255, p. 549-551. This is not the case, however, where an informer's identity remains undisclosed. Such an informer risks nothing. Indeed, he may be motivated by the prospects of a reward or by ill will toward the accused. Without some corroboration or a past history of supplying reliable information, there is nothing to guarantee the integrity of an informer who bolsters his conclusion by bald assertions of criminal activity while completely insulated by his anonymity from any of the risks which render declarations against interest trustworthy.

This point should be reviewed by the Court because it is novel and it is extremely important to the administration of criminal justice. In addition, the Virginia Supreme Court of Appeals' decision is not in harmony with the requirements of establishing reliability and credibility set forth in *Spinelli* and *Aguilar*.

II. A search warrant is invalid where it fails to specify with certainty the place to be searched and resort must be had to sources independent of the warrant in order to ascertain with definiteness which portion of a building is to be searched.

Section 19.1-85, Code of Virginia, 1950, 1960, Repl. Vol., required the place to be searched to be described in the affidavit required preliminary to the issuance of a search warrant:

> ". . . an affidavit of some person reasonably describing the house, place, vehicle or baggage to be searched, . . . No search warrant shall be issued on an affidavit omitting such essentials, and no general warrant for the search of a house, place, compartment, vehicle or baggage shall be issued."

The affidavit in this case did not specify the place to be searched with sufficient certainty. The affidavit merely referred to the apartment of Melvin Manley at 313 West 27th

Street. 313 West 27th Street is a residential building containing five separate apartment units. Tr. 64. The apartments are numbered and there is no apartment therein, or any portion of the premises that has ever been owned by or rented to a Melvin Manley. Tr. 67, 73.

In *United States v. Chin On*, 297 F. 531 (1924), a leading case, the Court stated:

> "This warrant, as I construe its slipshod language, authorizes the search of a room or rooms which were on the third floor of a building numbered 24 Liberty Street and were occupied by a person whose true name was unknown, but who was known as Fook Tsue Sung. On the testimony, he was a real person who occupied the next building, number 23 Liberty Street. He did not occupy the rooms searched. If both front and rear buildings be regarded as coming within the number, 24, which was on the front one, there were several rooms on the third floor. The warrant does not specify which of these is to be searched, except by the statement as to occupancy, which was entirely erroneous and of no assistance in locating them."

In State of *New Jersey v. Harold Ratashny*, 198 A.2d 131 (1964), a search warrant which did not specify properly and with certainty an apartment in a multi-apartment dwelling was held to be invalid. The Court stated:

> "We hold that where the premises reasonably believed to house illegal activities or know or reasonably should have been known by the police to be premises being utilized for the occupancy of more than one family, a search warrant must contain as specific a description of the particular area to be searched as the nature of the circumstances reasonably permit."

Petitioner submits that an affidavit failing to describe a portion of a multi-apartment building with more certainty then "the apartment of Melvin Lloyd Manley" is inadequate and void where it is demonstrated that it could not be determined whether an apartment in the building was rented or occupied by petitioner. The particular sub-unit of the building sought to be searched was not set forth with sufficient particularity to enable the searching officers to locate it without an independent investigation.

This issue should be reviewed because the search was improper and it is necessary to set forth further standards as to the specificity required in search warrants issued for multiple unit buildings.

CONCLUSION

The petition for writ of certiorari should be granted for the above reasons.

Respectfully submitted,

MELVIN LLOYD MANLEY

/s/ *Stanley E. Sacks*

His attorney

STANLEY E. SACKS,
SACKS, SACKS & TAVSS
First & Merchants National Bank Bldg.
Norfolk, Virginia 23510

APPENDIX

MANLEY v. COMMONWEALTH, 211 VA. 146.

Opinion.

Melvin Lloyd Manley, defendant, was convicted by the court of possession of marijuana, a narcotic drug, in violation of § 54-488, Code of 1950, 1967 Rep. Vol.,[1] and sentenced to confinement in the State penitentiary for a term of four years and fined $500. We granted defendant a writ of error.

At the commencement of the trial in the court below the defendant, by counsel, moved the court to suppress the evidence of the marijuana seized on the grounds that the affidavit upon which the search warrant was issued was based on hearsay information;[2] that the affidavit did not state sufficient facts and circumstances constituting probable cause for issuance of the warrant; and that the search of his premises and seizure of the marijuana violated the rights guaranteed to him by the Fourth Amendment to the Constitution of the United States. After hearing evidence, the trial court overruled the motion.

On July 11, 1968, at about 11:30 a.m., Detective R. H. Isaacs of the Norfolk Police Department obtained from a justice of the peace a warrant authorizing him to search the apartment of the defendant at 313 W. 27th Street in the City of Norfolk. Shortly thereafter Isaacs and another detective went to the defendant's apartment and served him with the search warrant.

There were five units in the apartment building, three on the first floor and two on the second floor. Defendant's apartment was on the first floor. Carole Speller, in whose name the apartment was rented, was also present when the officers entered the apartment. Defendant paid the rent on one occasion, and his name appeared on the mailbox.

Upon searching the front room of the apartment, Isaacs found a large quantity of marijuana in a cabinet and in a suitcase. Defendant volunteered the statement that Miss Speller had "nothing to do with it, it's mine."

The relevant portion of the affidavit on which the warrant was obtained reads as follows:

> "2. The material facts constituting probable cause for issuance of the search warrant. I have received information from a reliable informant who states that he was at the apartment of Melvin Lloyd

1. Now Code § 54-524.55, Acts of 1970, c. 650, at 1369.

2. This contention was later abandoned, it having been held in *Jones* v. *United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), that an affidavit may be based on hearsay information.

Manley, 313 West 27th Street, this past week and he saw a large quantity of marijuana (a narcotic drug) in a chest in the front room and also some marijuana was in a dresser drawer in the middle room. My informer also states that in the past month he has smoked marijuana in the apartment * * * and in the past month he has made two purchases of marijuana from Melvin Lloyd Manley.

* * * * *

"4. Place to be searched: 313 West 27th Street, a dwelling. The apartment of Melvin Lloyd Manley."

Defendant now contends (1) that the trial court erred in admitting in evidence the seized marijuana because (a) the justice of the peace was without authority to take the affidavit upon which he issued the search warrant, (b) the affidavit did not state the underlying circumstances for the informant's conclusion that the marijuana was where he said it was and that the informant was "credible" or his information "reliable," and (c) the apartment to be searched was not sufficiently described in the affidavit and warrant; and (2) that the evidence was insufficient to support his conviction.

Section 19.1-85, Code of 1950, as amended, 1960 Rep. Vol., provides in part that no search warrant may issue until there is filed with the officer authorized to issue the warrant an affidavit reasonably describing the house or place to be searched and also alleging material facts constituting probable cause for the issuance of the warrant.

When the general laws relating to justices of the peace were revised and amended by Chapter 639, Acts of 1968, there was deleted from Code § 49-4[3] the provision for making affidavits before or administering oaths by justices of the peace. Thus defendant argues that since the justice of the peace was not authorized by statute to take the affidavit, the warrant was void, the search illegal, and the evidence obtained in the illegal search and seizure was inadmissible.

The question of the authority of the justice of the peace to take the affidavit was raised for the first time on this appeal.

[1] The Supreme Court of the United States recognized in footnote 9 of its opinion in *Mapp* v. *Ohio*, 367 U.S. 643, 659, 81 S.Ct. 1684, 1693, 6 L.E.2d 1081, 1092, 84 A.L.R.2d 933, 945 (1961), *rehearing denied* 368 U.S. 871, 82 S.Ct. 23, 7 L.Ed.2d 72 (1961),

3. The deleted provision was restored by Acts of 1970, ch. 783, at 1681. Obviously it was inadvertently deleted by Acts of 1968.

Constitution of the United States, Amendment XIV, Section 1:

". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

On July 11, 1968, at about 11:30 o'clock a.m. Detective R. H. Isaacs of the Norfolk Police Department obtained a warrant authorizing him to search the apartment of Melvin Lloyd Manley at 313 West 27th Street, in the City of Norfolk, Virginia, for narcotics. The affidavit executed by Officer Isaacs in relevant part reads as follows:

* * *

Melvin Manley

Affidavit for Search Warrant

* * *

2. The material facts constituting probable cause for issuance of the search warrant. I have received information from a reliable informant who states that he was at the apartment of Melvin Lloyd Manley, 313 West 27th Street, this past week and he saw a large quantity of marijuana (a narcotic drug) in a chest in the front room, and also some marijuana was in a dresser drawer in the middle room. My informer also states that in the past month he has smoked marijuana in the apartment of Melvin Lloyd Manley, 313 West 27th Street, and in the past month he has made two purchases of marijuana from Melvin Lloyd Manley.

3. What is to be searched for under the search warrant: Narcotic drugs.

4. Place to be searched: 313 West 27th Street, a dwelling. The apartment of Melvin Lloyd Manley.

Detective Isaacs
Affiant

11th July 1968"

The information contained in the affidavit was given to Officer Isaacs at about 11:00 o'clock a.m., on the 11th of July, 1958, by an informer known to Isaacs, but otherwise unidentified, over the telephone. Tr. 33. No information was recited in the affidavit to support the affiant's conclusion that the informer was reliable, nor were any corroborating facts or underlying circumstances furnished in the affidavit in order to establish the reliability of the information received from the informer.

Having obtained a search warrant based on the above affidavit Officer Isaacs and another detective went to 313 West 27th Street in Norfolk. They found the premises to be a five-unit residential apartment building. Tr. 64. The building was owned, as it had been for seven years, by Mr. and Mrs. Edward Carter. Tr. 65. During their ownership the units had always been rented out. All of the units are numbered, or are supposed to have numbers. Tr. 67. Apartment one, so numbered on the door, which has always been the case, Tr. 69, 70, is on the first floor of the building and to the left as one enters the main door to the building from the front porch. On July 11, 1968, apartment one was rented to Carole Speller and it had been rented to her for approximately three years. Neither apartment one nor any other apartment or portion of the premises had ever been rented to Melvin Manley at any time. Tr. 73.

Officer Isaacs testified that when he and the other officer arrived at the premises there were two mailboxes on the front

that the informer was speaking with personal knowledge and relating his own participation with that of the suspects in their illegal activities. In the concurring opinion of Mr. Justice White in *Spinelli*, 393 U.S. at 425, 89 S.Ct. at 593, 21 L.Ed.2d at 649, it is said:

> "* * * But if, for example, the informer's hearsay comes from one of the actors in the crime in the nature of an admission against interest, the affidavit giving this information should be held sufficient."

Here the affidavit established that the informant was stating facts based on his own personal knowledge and was relating his participation in defendant's illegal activity. His statements were admissions against interest. These facts certainly show a substantial basis for the officer-affiant to state that the informant was reliable and for a neutral and detached magistrate to conclude that the informant's information was reliable and that probable cause existed for the issuance of the warrant. Probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause.[4] Hence we hold that the reliability standard of *Aguilar* and *Spinelli* was met.

[4] Defendant says that since the identity of the apartment to be searched was not described with sufficient particularity, the affidavit and warrant were invalid. We do not agree.

Under the Constitution of the United States and the statutory law of Virginia it is essential to the validity of a search warrant that it describe with particularity the place to be searched. All that is required, however, is that the description be such that the officer charged with executing the search warrant can, with reasonable effort, ascertain and identify the place intended.

It has been generally held that a search warrant directed against a multiple-occupancy structure is invalid if it fails to describe the particular sub-unit to be searched with sufficient definiteness to preclude search of other units located in the larger structure and occupied by innocent persons. But there are exceptions to the general rule. Even though a search warrant directed against a multiple-occupancy structure fails to describe the particular sub-unit to be searched, it will ordinarily not be held invalid where it adequately specifies the name of the occupant of the sub-unit against which it is

4. *Beck* v. *Ohio*, 379 U.S. 89, 96, 85 S.Ct. 223, 228, 13 L.Ed.2d 142, 147-48 (1964).

directed and provides the searching officers with sufficient information to identify, without confusion or excessive effort, such apartment unit. See Annotation: "Search Warrant—Apartment or Room," 11 A.L.R.3d 1330, §§ 3 and 5, at 1333-39, 1340-41.

Here the affidavit and warrant gave the address of the apartment building and named the defendant as the person whose apartment was to be searched. The language used limited the search to the apartment unit occupied by the defendant. There were only five subunits in the entire building, and we think the apartment of the defendant was sufficiently described for the searching officers to locate it with very little effort.

Lastly, the defendant contends that the mere showing of the presence of marijuana in an apartment, which was occupied by another, is not sufficient to sustain his conviction. There is no merit in this contention.

The evidence shows that the defendant voluntarily stated to the officers that the marijuana found in the apartment was his, and that Carole Speller, who was present at the time of the search and seizure, had nothing to do with it.

For the reasons stated, the judgment is

Affirmed.

GORDON, J., concurring in result.

The majority concludes that an informer may be found credible or his information found reliable because he claimed to be an eyewitness or because his information was detailed. I do not so read the opinion of the Court and the concurring opinion of Mr. Justice White in *Spinelli* v. *United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). And I believe reason militates against such a conclusion.

I agree with the majority, however, that reliability in this case was sufficiently established by the informer's admission against interest. So I concur in affirming the judgment.

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October Term, 1970

No. 1045

MELVIN LLOYD MANLEY,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
Assistant Attorney General

VANN H. LEFCOE
Assistant Attorney General

Supreme Court–Library Building
Richmond, Virginia 23219

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United States v. Thacker, 382 F.2d 732 (6th Cir. 1967) 8

United States v. Ventresca, 380 U.S. 102, 13 L.ed.2d 684, 85 S.Ct. 741 (1965) 10

Wiles v. Commonwealth, 209 Va. 282, 163 S.E.2d 595 (1968) 7

Statutes

Virginia Code (1950), as amended:

Section 19.1-85 .....5, 6

Section 54-488 2

Supreme Court of the United States

October Term, 1970

No. 1045

MELVIN LLOYD MANLEY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

PRELIMINATY STATEMENT

By letter of the Honorable E. Robert Seaver, Clerk of the Supreme Court of the United States, dated February 16, 1971, the Attorney General of Virginia was requested to file a response to the petition for writ of certiorari in the instant case. (App. "A") In accordance with the request contained in the above mentioned communication, written by the Clerk at the direction of this Court, the within brief of the respondent in opposition to the petition for writ of certiorari is filed.

PRIOR PROCEEDINGS

This cause is currently before this Court upon a petition for writ of certiorari to the Supreme Court of Appeals of

Virginia, filed in this Court by petitioner on December 2, 1970. The case arose before the Virginia Court, styled *Melvin Lloyd Manley, alias etc., Appellant* v. *Commonwealth of Virginia,* Appellee, upon a writ of error and supersedeas awarded June 17, 1969, from a judgment rendered by the Corporation Court of the City of Norfolk, Part Two, on the 27th day of September, 1968, wherein the petitioner, Melvin Lloyd Manley, alias Melvin Lard Manley, alias Melvin Manley, alias Melvin Lord Manley, was found guilty of a violation of § 54-488[1] of the Code of Virginia (1950), as amended, possession of narcotics, and sentenced to confinement in the State Penitentiary for a period of four (4) years and further fined the sum of Five Hundred Dollars ($500.00).

The judgment of the lower court was affirmed by the Supreme Court of Appeals of Virginia in its opinion handed down on the 4th day of September, 1970, and reported at 211 Va. 146, 176 S.E.2d 309 (1970). (App. "B")

STATEMENT OF FACTS

Petitioner questions, in this proceeding, the following affidavit deemed valid by the Virginia Supreme Court of Appeals:

> "Before me, LeRoy T. Cheshire, a Justice of the Peace of the City aforesaid, this day appeared Detective R. H. Isaacs, Police Officer, and made affidavit as follows:
>
> "Caption No. 1: Substantially the offense in relation to which search is to be made: Violation Section 54-488, State Code, Possession of Narcotic Drugs.

[1] "§ 54-488. It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this article."

"Caption No. 2: The material facts constituting probable cause for issuance of the Search Warrant: I have received information from a reliable informant who states that he was at the apartment of Melvin Lloyd Manley, 313 West 27th Street, this past week, and he saw a large quantity of marijuana, a narcotic drug, in a chest in the front room, and also some marijuana was in a dresser drawer in the middle room. My informer also states that in the past month he had smoked marijuana in the apartment of Melvin Lloyd Manley, 313 West 27th Street, and in the past month he has made two purchases of marijuana from Melvin Lloyd Manley.

"Caption No. 3: What is to be searched for under the Search Warrant: Narcotic drugs.

"Caption No. 4: The place to be searched: 313 West 27th Street, a dwelling. The apartment of Melvin Lloyd Manley. * * * signed * * * Detective R. H. Isaacs, Affiant.

"Subscribed and sworn to before me this 11th day of July, 1968. * * * signed LeRoy T. Cheshire, Justice of the Peace, * * * 11:30 A.M." (R. p. 14)

The facts pertinent to the issuance of the search warrant, which was based upon the above affidavit, are as follows:

At approximately 11:30 A.M. on the 11th of July, 1968, Detective R. H. Isaacs of the Norfolk Police Department's Narcotics Squad, obtained a search warrant to search 313 West 27th Street in the City of Norfolk, the apartment of Melvin Lloyd Manley, hereinafter sometimes referred to as petitioner. (R. pp 8, 14) The obtaining of the search warrant was precipitated by information Detective Isaacs received from a reliable informant that a large quantity of marijuana was in a chest in the front room of the apartment and additional marijuana was in a dresser drawer in the middle room. (R. p. 14)

The information delivered to Detective Isaacs was information personally known to the informant who had seen the marijuana, smoked some of it in petitioner's apartment, and had made two purchases of the narcotic. (R. p. 14)

At approximately 11:45 A.M. of the same morning, Detective Isaacs, together with Detective James Christmas proceeded to the address in the search warrant. (R. p. 8) Detective Isaacs knew that the building at the address was an apartment house but was unaware of the number of apartment units contained therein. (R. p. 23) It was a five apartment unit building. (R. p. 39)

Upon their arrival at the apartment house Detective Isaacs ascertained from an upstairs tenant that the apartment unit they were looking for was Apartment No. One. (R. p. 8) This apartment was rented by a Miss Carole Speller (R. p. 42) and apparently had never been rented by Manley who resided at 1012 Hanson Avenue. (R. p. 69) However, it was Manley who allowed the officers entry to the apartment. (R. p. 80) Upon stating to the officers that he was Melvin Lloyd Manley and that he lived there, Detective Christmas served him with the search warrant which had been obtained. (R. p. 80) The officers proceeded to search the apartment; Detective Isaacs searching the front room which petitioner stated, when asked whose room it was, that "it's mine," (R. p. 9), and Detective Christmas searched the middle room. (R. p. 34)

Upon searching a cabinet in the front room, which Detective Isaacs felt was the chest to which his informant had referred (R. p. 34) he found a brown paper bag which contained marijuana, together with a large quantity of small manila envelopes. (R. p. 10) Additional marijuana was found inside a brown leather briefcase which contained three bags of marijuana. (R. pp. 12, 13)

QUESTIONS PRESENTED

1. Whether an affidavit given preliminary to the issuance of a search warrant is sufficient where the facts were all stated by an unidentified informant, who is only described therein as "a reliable informant" without containing any underlying circumstances as to his credibility or the reliability of his information.

2. Whether a search warrant is valid which attempts to describe an apartment in a building to be searched only with reference to the name of a person alleged to occupy said apartment where resort must be had to sources independent of the warrant in order to ascertain which apartment in a multiple unit building was to be searched.

ARGUMENT

I.
The Search Was Valid

Section 19.1-85[2] of the Code of Virginia (1950), as amended, provides in part that no search warrant may issue until, filed with the officer who issues a search warrant, there is an affidavit reasonably describing the house or place to be searched and also alleging briefly, material facts con-

[2] § 19.1-85. "No search warrant shall be issued until there is filed with the officer authorized to issue the same an affidavit of some person reasonably describing the house, place, vehicle or baggage to be searched, the things to be searched for thereunder, alleging briefly material facts, constituting the probable cause for the issuance of such warrant and alleging substantially the offense in relation to which such search is to be made. Such affidavit shall be certified by the officer who issues such warrant to the county clerk of his county or to the court clerk, admitting deeds to record, of his city and shall by such clerk be preserved as a record and shall at all times be subject to inspection by the public. No such warrant shall be issued on an affidavit omitting such essentials, and no general warrant for the search of a house, place, compartment, vehicle or baggage shall be issued."

stituting the probable cause for the issuance of such warrant.

Petitioner argues that the affidavit in the case at bar was not in compliance with § 19.1-85 in two respects. First, since since the affidavit contained only hearsay information from an informant without any facts as to informant's credibility, material facts were not set forth; and second, the place to be searched was not stated with the requisite particularity.

Response will be made separately to each assertion.

(A)

Material Facts Were Set Forth

Petitioner's attack that material facts constituting probable cause were not set forth in the affidavit is very simple. He asserts that information received from an outside source however sufficient its content may be will not suffice to show probable cause unless there is further stated circumstances demonstrating that the informant is reliable. There are cases which seem to so hold. See *Cervantes* v. *United States,* 263 F.2d 800, 804, fn. 8 (9th Cir. 1959).

However, these cases did not have the advantage of this Court's decision in *Spinelli* v. *United States,* 393 U.S. 410, 21 L.ed2d 637, 89 S.Ct. 584 (1969), which explicated *Aguilar* v. *Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.ed.2d 723 (1964). What can be gleaned from *Spinelli* is that *Aguilar* is a two pronged test. *First,* there must be set forth in the affidavit underlying circumstances necessary to enable the magistrate independently to judge the validity of the informant's conclusions, and *second,* the affiant-officers must support their claim that their informant was credible, *or* his information reliable. This disjunctive phraseology is vitally important, for the reliability of an informant may be

demonstrated to the magistrate in many collateral ways. *McCreary* v. *Sigler,* 406 F.2d 1264, 1268 (8th Cir. 1969).

As seen time and time again in *Aguilar* and in the Virginia Supreme Court's ruling in *Wiles* v. *Commonwealth,* 209 Va. 282, 163 S.E.2d 595 (1968), conclusory statements do not constitute the safeguards necessary to enable a neutral and detached magistrate to determine if probable cause exists for the issuance of a search warrant. The "suspicion," "belief" or "mere conclusion," *Aguilar;* the "casual rumor circulating in the underworld," or the "accusation based merely on an individual's general reputation," *Spinelli;* does not constitute the requisite probable cause. Underlying circumstances reflecting a first hand knowledge is the desired criteria. *United States* v. *Acarino,* 408 F.2d 512, 515 (2nd Cir. 1969).

The fact that the affidavit in the case at bar was based on hearsay information and did not reflect direct personal observation of the affiant does not render it invalid. *Jones* v. *United States,* 362 U.S. 257, 4 L.ed.2d 697, 80 S.Ct. 275 (1960). Further in the case at bar the first of the two prong test of *Aguilar* was clearly met. The underlying circumstances from which the informant concluded that appellant possessed narcotics were fully and cogently set forth. The informant personally observed the narcotics, he smoked the marijuana in petitioner's apartment and he had made two purchases of marijuana from petitioner. (R. p. 14)

From the manner in which the underlying circumstances were set forth, the hearsay information was sufficiently reliable to meet the second prong of the *Aguilar* test. How reliable the informant was in the past is not important if the circumstances even without corroboration have a built in credibility, such as in the case at bar, which definitely guides

one to the informant's reliability. *McCreary* v. *Sigler, supra; United States* v. *Thacker,* 382 F.2d 732 (6th Cir. 1967). The essence of reliability may be found, and in the case at bar was found, in the informant's statement of facts which differ from an allegation of mere conclusory suspicion of the type which the courts cast a jaundiced eye upon. *McCreary* v. *Sigler, supra.* The informant who allegedly is an eye witness to a crime perpetrated or to contraband that is possessed by an individual demonstrates sufficient reliability. *McCreary* v. *Sigler, supra,* at 1269. In direct accord see *Coyne* v. *Watson,* 282 F. Supp. 235 (S.D. Ohio, 1967), aff. 392 F.2d 585 (6th Cir. 1968); *United States* v. *Barnett,* 407 F.2d 1114 (6th Cir. 1969); *United States* v. *Simon,* 409 F.2d 474, 477 (7th Cir. 1969), cert. den. Also see *United States* v. *Kidd,* 407 F.2nd 1316 (6th Cir. 1969), wherein a conclusory statement was set forth but information of the informant's reliable past was also set forth—the reverse of the case at bar. Thus in the case at bar probable cause for the issuance of the search warrant did exist since the underlying circumstances demonstrated first hand personal knowledge and at the same time established the reliability of the informant.

Moreover, the informant had clearly been a participant with Manley in crimes involving use and distribution of illegal drugs, and the information given to the police officers certainly made the informant liable to prosecution. This type of informant has, since *Spinelli,* been held to be reliable based on the nature of his information, assuming the information itself is sufficiently detailed to be reliable within the meaning of the first prong of the *Aguilar* test. See *United States* v. *Berry,* 423 F.2d 142 (10th Cir. 1970); *Louie* v. *United States,* 426 F.2d 1398 (9th Cir. 1970). Although in both *Berry* and *Louie* the informant was named in the affidavit, there appears no reason why this should be

required since to do so might destroy any future usefulness of the individual as an informant by disclosing his identity.

As succinctly set forth in the opinion of the Virginia Supreme Court of Appeals in the case at bar:

> "The most commonly accepted and approved allegation to substantiate reliability is that the informer is a person of known and proven reliability and has furnished information to law enforcement officers which has been instrumental in procuring convictions. But the credibility of the informer or the reliability of his information may be shown in other ways. Reliability may be found in an informant's statement of facts as an "eyewitness." *McCreary* v. *Sigler,* 406 F.2d 1264, 1269, *cert. denied,* 395 U.S. 984, 89 S.Ct. 2149, 23 L.Ed.2d 773 (8th Cir. 1969). In *People* v. *Montague,* 19 N.Y.2d 121, 278 N.Y. Supp. 2d 372, 224 N.E.2d 873, *cert. denied,* 389 U.S. 862, 88 S.Ct. 116, 19 L.Ed. 2d 130 (1967), the reliability standard was said to have been met where the affidavit in sufficient detail established that the informer was speaking with personal knowledge and relating his own participation with that of the suspects in their illegal activities. In the concurring opinion of Mr. Justice White in *Spinelli,* 393 U.S. at 425, 89 S.Ct. at 593, 21 L.Ed.2d at 649, it is said:
>
> " '* * * But if, for example, the informer's hearsay comes from one of the actors in the crime in the nature of an admission against interest, the affidavit giving this information should be held sufficient.'
>
> "Here the affidavit established that the informant was stating facts based on his own personal knowledge and was relating his participation in defendant's illegal activity. His statements were admissions against interest. These facts certainly show a substantial basis for the officer-affiant to state that the informant was reliable and for a neutral and detached magistrate to conclude that the informant's information was reliable

> and that probable cause existed for the issuance of the warrant. Probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause. Hence we hold that the reliability standard of *Aquilar* and *Spinelli* was met."

Also significant and to be borne in mind is that *Spinelli* besides explicating *Aguilar* reaffirmed the established propositions with regard to the issuance of a search warrant: only probability and not a prima facie showing of criminal activity is the standard of probable cause. *Beck* v. *Ohio,* 379 U.S. 89, 96, 13 L.ed.2d 142, 147, 85 S.Ct. 223 (1964); affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial. *McCray* v. *Illinois,* 386 U.S. 300, 311, 18 L.ed.2d 62, 87 S.Ct. 1056 (1967); in judging probable cause issuing magistrates are not confined by niggardly limitations or by restrictions of the use of their common sense. *United States* v. *Ventresca,* 380 U.S. 102, 108, 13 L.ed.2d 684, 85 S.Ct. 741 (1965); the determination of probable cause by the issuing magistrate should be paid great deference by reviewing courts. *Jones* v. *United States, supra.* In applying these propositions, together with the two pronged test of *Aguilar,* to the factual situation in the case at bar clearly demonstrates that a disinterested judicial officer could validly determine that probable cause existed for the issuance of the search warrant.

(B)

THE PLACE TO BE SEARCHED WAS REASONABLY DESCRIBED

Petitioner's other claimed deficiency of the affidavit is that the place to be searched was not set forth with the requisite particularity.

The pertinent provision of the affidavit stated that the place to be searched was "313 West 27th Street, a dwelling. The apartment of Melvin Lloyd Manley." (R. p. 14)

The dwelling at 313 West 27th Street was a residental apartment house containing five apartment units. (R. p. 39) Though Detective Isaacs was unaware of the number of apartment units, he was aware that the dwelling was an apartment house. (R. p. 23) Upon inquiry to an upstairs tenant, Detective Isaacs found that Manley resided in Apartment No. One. (R. pp. 8, 42) It appears that Apartment No. One was rented to a Miss Carole Speller and that no portion of the premises had ever been owned by or rented to petitioner (R. pp. 42-3), who resided at 1012 Hanson Avenue, Norfolk, Virginia. (R. p. 69) Manley did, however, apparently consider the first room of Miss Speller's three room apartment as his. (R. p. 9)

What petitioner's argument boils down to is that his failure to hold a proprietary interest in the place searched, which was in fact Apartment No. One rented by Carole Speller, means that it was not his apartment and thus the place to be searched was not set forth with the requisite particularity. Such an approach overlooks a fundamental thesis. For just as a proprietary interest in the premises is not necessary in order to enable appellant to raise the question of the illegality of the search, *Jones* v. *United States,* 362 U.S. 257, 4 L.ed.2d 697, 80 S.Ct. 725 (1960), it must follow that in the case at bar the failure of petitioner to hold a proprietary interest does not invalidate the search warrant on the ground that the place to be searched was not set forth with the requisite particularity.

A search warrant designates the place to be searched with sufficient particularity when from the description therein the officer executing the warrant can definitely locate the

place to be searched. *State* v. *Taylor,* 42 S.E.2d 549 (W.Va. 1947). The particularity of place means that any person familiar with the locality can by inquiry identify the premises which are described in the warrant. *United States* v. *Chin On,* 297 F. 531 (1924).

Petitioner relies upon both *Chin On, supra,* and *State* v. *Ratushny,* 198 A.2d 131 (N.J. 1964), as authority for his position. In actuality both set forth the law applicable to whether a place to be searched is set forth with reasonable particularity and an analysis of each case demonstrates that in the case at bar the place to be searched was set forth in compliance with requisite specificity and not in general terms. In *Chin On, supra,* the search warrant authorized a search of a room or rooms on the third floor of the building, No. 24 Liberty Street. The only manner in which an officer could particularize the exact apartment to be searched was by the alleged occupancy of a Fook Tsue Sung who in fact lived in an entirely different building and did not occupy any of the rooms searched. Therefore the statement as to occupancy was entirely erroneous and of no assistance in particularizing the apartment to be searched. The case at bar differs in that the statement as to occupancy did aid in particularizing the premises to be searched.

In *Ratushny* the search warrant described the dwelling to be searched and didn't even mention that it was an apartment house or contained four apartments. That being the case, the court held that "a warrant which describes an entire apartment building when cause is shown for searching only one apartment is void," *Ratushny, supra,* at p. 134. The affidavit at bar set forth that only one apartment, Manley's, could be searched.

Naturally the most specific description of a particular area to be searched is desirable. In many cases the best

description would be the designation of a particular apartment number or location. In the case at bar, though the description "the apartment of Melvin Lloyd Manley" fell short of the particularity most desired, it did indicate to the officers executing the warrant that they were not at liberty to search every apartment in the dwelling located at 313 West 27th Street. Detective Isaacs realized that the dwelling was an apartment house and further realized that the authorizing instrument that he had obtained was not a license to intrude at whim. The description in the affidavit was stated with the requisite particularity so that the officers with inquiry could identify and did identify the premises licensed to be searched.

As stated by the Virginia Court:

> "Here the affidavit and warrant gave the address of the apartment building and named the defendant as the person whose apartment was to be searched. The language used limited the search to the apartment unit occupied by the defendant. There were only five subunits in the entire building, and we think the apartment of the defendant was sufficiently described for the searching officers to locate it with very little effort."

CONCLUSION

For the foregoing reasons, counsel for the Commonwealth submit that the search warrant in the case at bar was issued with the requisite specificity as to location of the apartment and with the requisite probable cause, thereby insuring the safeguard of petitioner's constitutional rights. The issues presented are not new or novel and the Virginia Supreme Court abided by and properly determined that the required "two prong test" of *Aguilar* and *Spinelli*

was met. The petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
VANN H. LEFCOE
Assistant Attorneys General

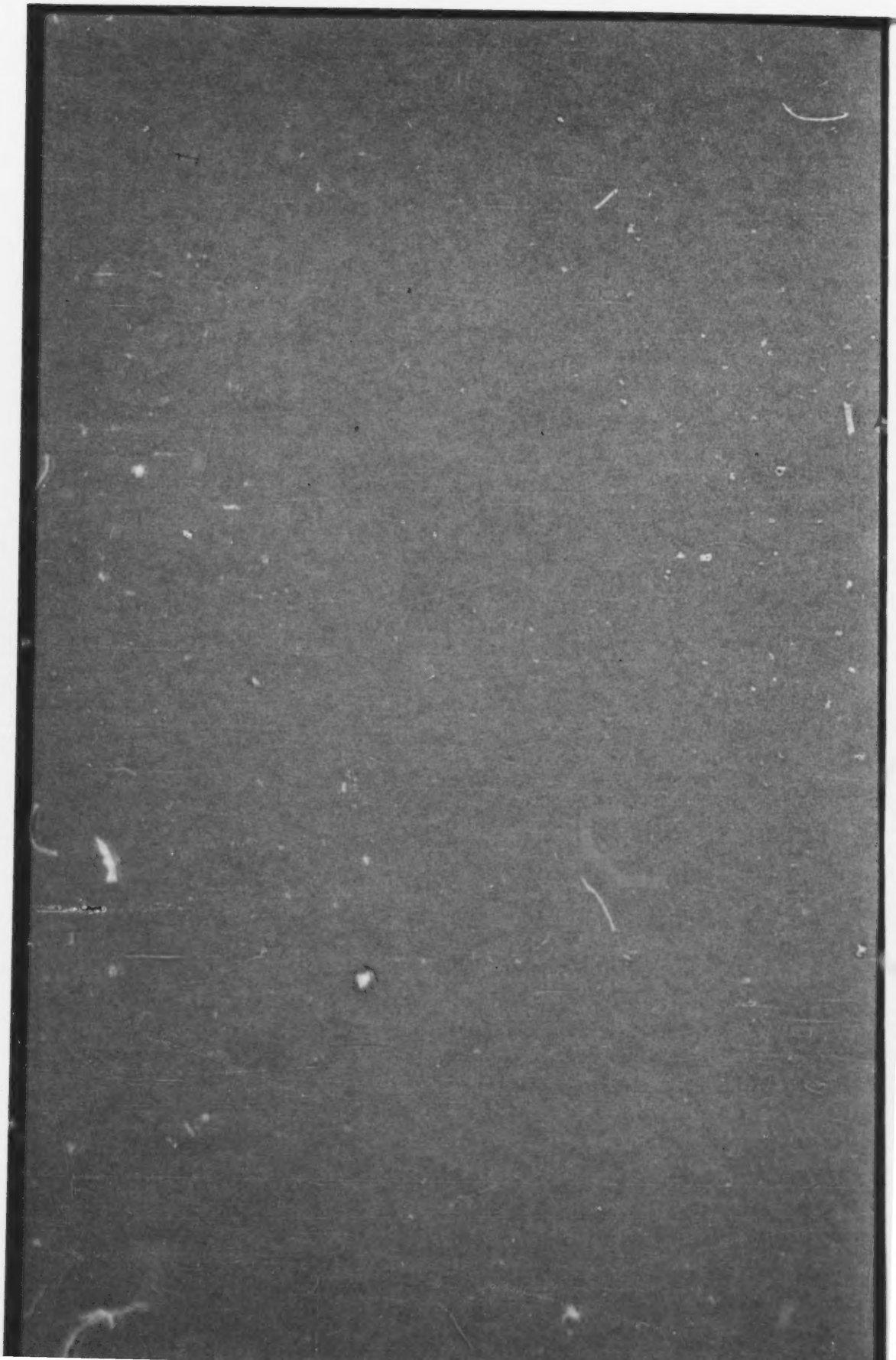
Supreme Court–Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Anthony F. Troy, Assistant Attorney General of Virginia, a member of the bar of the Supreme Court of the United States, and one of counsel for the Commonwealth of Virginia, hereby certify that on this, the 16 day of March, 1971, three copies of the foregoing Brief for Respondent in Opposition to the Petition for Writ of Certiorari were served upon counsel of record for the petitioner herein by depositing the same in the United States Post Office, first class postage prepaid, to Stanley E. Sacks, Esquire, Sacks, Sacks, and Tavss, 915 First and Merchants National Bank Building, Norfolk, Virginia, 23510.

.....

ANTHONY F. TROY



APPENDIX "A"

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

E. Robert Seaver
Clerk of the Court

February 16, 1971

The Honorable Andrew P. Miller
Attorney General of Virginia
Richmond, Virginia

Re: Manley v. Virginia
No. 1045, October Term, 1970

Dear Sir:

A petition for a writ of certiorari was filed in this Court on December 2, 1970, in the above-entitled case, and our records indicate that you were served with a copy of the petition.

The Court has directed this office to request that a response be filed in this case. Forty printed copies of the response, together with proof of service thereof, should reach this office on or before March 18, 1971.

Very truly yours,

E. ROBERT SEAVER, Clerk

By /s/ Michael Rodak, Jr.
Michael Rodak, Jr.
Deputy Clerk

jmh

cc: Joseph E. Campbell, Jr., Esq.
Commonwealth Attorney
City Hall Building
Norfolk, Virginia 23510

Stanley E. Sacks, Esq.
First and Merchant's
National Bank Bldg.
Norfolk, Virginia 23510

APPENDIX "B"

Present: All the Justices

RECORD NO. 7273

MELVIN LLOYD MANLEY, ALIAS, ETC.

v.

COMMONWEALTH OF VIRGINIA

FROM THE CORPORATION COURT OF THE CITY OF NORFOLK, PART TWO

LINWOOD B. TABB, *Judge*

Opinion by Justice Lawrence W. I'Anson
Staunton, Virginia, September 4, 1970

Melvin Lloyd Manley, defendant, was convicted by the court of possession of marijuana, a narcotic drug, in violation of § 54-488, Code of 1950, 1967 Rep. Vol.,[1] and sentenced to confinement in the State penitentiary for a term of four years and fined $500. We granted defendant a writ of error.

At the commencement of the trial in the court below the defendant by counsel, moved the court to suppress the evidence of the marijuana seized on the grounds that the affidavit upon which the search warrant was issued was based on hearsay information;[2] that the affidavit did not

---

[1] Now Code § 54-524.55, Acts of 1970, c. 650, at 1369.

[2] This contention was later abandoned, it having been held in *Jones* v. *United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), that an affidavit may be based on hearsay information.

state sufficient facts and circumstances constituting probable cause for issuance of the warrant; and that the search of his premises and seizure of the marijuana violated the rights guaranteed to him by the Fourth Amendment to the Constitution of the United States. After hearing evidence, the trial court overruled the motion.

On July 11, 1968, at about 11:30 a.m., Detective R. H. Isaacs of the Norfolk Police Department obtained from a justice of the peace a warrant authorizing him to search the apartment of the defendant at 313 W. 27th Street in the City of Norfolk. Shortly thereafter Isaacs and another detective went to the defendant's apartment and served him with the search warrant.

There were five units in the apartment building, three on the first floor and two on the second floor. Defendant's apartment was on the first floor. Carole Speller, in whose name the apartment was rented, was also present when the officers entered the apartment. Defendant paid the rent on one occasion and his name appeared on the mailbox.

Upon searching the front room of the apartment, Isaacs found a large quantity of marijuana in a cabinet and in a suitcase. Defendant volunteered the statement that Miss Speller had "nothing to do with it, it's mine."

The relevant portion of the affidavit on which the warrant was obtained reads as follows:

> "2. The material facts constituting probable cause for issuance of the search warrant. I have received information from a reliable informant who states that he was at the apartment of Melvin Lloyd Manley, 313 West 27th Street, this past week and he saw a large quantity of marijuana (a narcotic drug) in a chest in the front room and also some marijuana was in a dresser drawer in the middle room. My informer also

states that in the past month he has smoked marijuana in the apartment * * * and in the past month he has made two purchases of marijuana from Melvin Lloyd Manley.

* * *

"4. Place to be searched: 313 West 27th Street, a dwelling. The apartment of Melvin Lloyd Manley."

Defendant now contends (1) that the trial court erred in admitting in evidence the seized marijuana because (a) the justice of the peace was without authority to take the affidavit upon which he issued the search warrant, (b) the affidavit did not state the underlying circumstances for the informant's conclusion that the marijuana was where he said it was and that the informant was "credible" or his information "reliable," and (c) the apartment to be searched was not sufficiently described in the affidavit and warrant; and (2) that the evidence was insufficient to support his conviction.

Section 19.1-85, Code of 1950, as amended, 1960 Rep. Vol., provides in part that no search warrant may issue until there is filed with the officer authorized to issue the warrant an affidavit reasonably describing the house or place to be searched and also alleging material facts constituting probable cause for the issuance of the warrant.

When the general laws relating to justices of the peace were revised and amended by Chapter 639, Acts of 1968, there was deleted from Code § 49-4[3] the provision for making affidavits before or administering oaths by justices of the peace. Thus defendant argues that since the justice of the peace was not authorized by statute to take the affidavit, the warrant was void, the search illegal, and the evi-

[3] The deleted provision was restored by Acts of 1970, ch. 783, at 1681. Obviously it was inadvertently deleted by Acts of 1968.

dence obtained in the illegal search and seizure was inadmissible.

The question of the authority of the justice of the peace to take the affidavit was raised for the first time on this appeal.

The Supreme Court of the United States recognized in footnote 9 of its opinion in *Mapp* v. *Ohio,* 367 U.S. 643, 659, 81 S.Ct. 1684, 1693, 6 L.Ed.2d 1081, 1092, 84 A.L.R. 2d 933, 945 (1961), *rehearing denied* 368 U.S. 871, 82 S.Ct. 23, 7 L.Ed.2d 72 (1961), that in determining whether a State criminal conviction is constitutionally permissible because of the admission of evidence obtained as a result of an illegal search and seizure, State procedural requirements must be respected.

Rule 1:8, Rules of Court, provides in part that all objections requiring a ruling or judgment of the trial court shall state with reasonable certainty the ground of objection, and unless it appears from the record to have been so stated, such objections will not be considered by this court. See *Fletcher* v. *Commonwealth,* 209 Va. 636, 640, 166 S.E.2d 269, 273 (1969).

An objection that a search warrant was not supported by an affidavit as required by statute cannot be raised for the first time on appeal from a conviction. See *Harlow* v. *Commonwealth,* 195 Va. 269, 273, 77 S.E. 851, 854 (1953); *Nicholas* v. *Commonwealth,* 186 Va. 315, 324, 42 S.E.2d 306, 311 (1947). See also *Frogg* v. *Commonwealth,* 163 Ky. 175, 173 S.W. 383, L.R.A. 1915D 330 (1915).

There is a general procedural requirement in most jurisdictions that if a defendant wishes to preserve his right to challenge on appeal the constitutionality of a search and seizure through which certain evidence has been obtained, he must take timely steps in the lower court, either through a motion to suppress the evidence before trial or by suffi-

cient objection to the use of the evidence when offered at trial. *United States* v. *Gitlitz,* 368 F.2d 501, cert. denied 386 U.S. 1038, 87 S.Ct. 1492, 18 L.Ed.2d 602, rehearing denied, 389 U.S. 908, 88 S.Ct. 210, 19 L.Ed.2d 227 (1966); 29 Am.Jur.2d, Evidence, §§ 425, 426, at 481, 483. See also Annotations: 50 A.L.R.2d 531, §§ 11, 12, at 583, 592, and 30 A.L.R.3d 128, § 10, at 178-84, and the numerous cases there collected.

Since the defendant did not raise the question of the authority of the justice of the peace to take the affidavit of the affiant-officer in the court below, it will not now be considered by us.

Defendant says that the affidavit upon which the search warrant was issued was insufficient in that it did not state the underlying circumstances constituting probable cause for the issuance of the warrant, as required by the test set out in *Aguilar* v. *Texas,* 378 U.S. 108, 114, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723 (1964), and later explained and referred to as a "two-pronged test" in *Spinelli* v. *United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

In *Aguilar* the test for determining probable cause in those many instances where the affidavit is based solely or substantially upon an informer's tip was set forth as follows: (1) the affidavit must describe some of the underlying circumstances necessary to enable a neutral and detached magistrate to judge the validity of the informant's conclusion that the narcotics were where he claimed they were; and (2) the affidavit must describe some of the underlying circumstances from which such magistrate can determine that the affiant officer's unnamed informant, whose identity need not be disclosed, was "credible" *or* his information "reliable."

Clearly the affidavit in the instant case satisfies *Aguilar's* first requirement of the test. The informant's information

was based on personal observation and participation in the defendant's illegal activity. The neutral and detached justice of the peace could thus conclude that the allegations were based on facts, not suspicion or rumor. *Spinelli, supra,* 393 U.S. at 416, 89 S.Ct. at 589, 21 L.Ed.2d at 643.

We next consider whether the affidavit meets the second requirement of the test, that of credibility or reliability.

Where the accuracy of the information received from a confidential informant is not supported by other sources known or stated to be accurate or from corroborated facts known or discovered by the affiant personally or from other official or reliable reports, the officer-affiant must present in his affidavit a substantial factual basis for crediting the informant's story.

A mere allegation that the affiant has "received information from a reliable informant" has been held insufficient to show that the informant was credible, or that his information was reliable. See *Riggan* v. *Virginia,* 384 U.S. 152, 86 S.Ct. 1378, 16 L.Ed.2d 431 (1966) (reversing 206 Va. 499, 144 S.E.2d 298).

The most commonly accepted and approved allegation to substantiate reliability is that the informer is a person of known and proven reliability and has furnished information to law enforcement officers which has been instrumental in procuring convictions. But the credibility of the informer or the reliability of his information may be shown in other ways. Reliability may be found in an informant's statement of facts as an "eyewitness." *McCreary* v. *Sigler,* 406 F.2d 1264, 1269, *cert. denied,* 395 U.S. 984, (8th Cir. 1969). In *People* v. *Montague,* 19 N.Y.2d 121, 278 N.Y. Supp.2d 372, 224 N.E.2d 873, *cert. denied* 389 U.S. 862, 88 S.Ct. 116, 19 L.Ed.2d 130 (1967), the reliability standard was said to have been met where the affidavit in sufficient detail established that the informer was speaking with

personal knowledge and relating his own participation with that of the suspects in their illegal activities. In the concurring opinion of Mr. Justice White in *Spinelli,* 393 U.S. at 425, 89 S.Ct. at 593, 21 L.Ed.2d at 649, it is said:

> "* * * But if, for example, the informer's hearsay comes from one of the actors in the crime in the nature of an admission against interest, the affidavit giving this information should be held sufficient."

Here the affidavit established that the informant was stating facts based on his own personal knowledge and was relating his participation in defendant's illegal activity. His statements were admissions against interest. These facts certainly show a substantial basis for the officer-affiant to state that the informant was reliable and for a neutral and detached magistrate to conclude that the informant's information was reliable and that probable cause existed for the issuance of the warrant. Probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause.[4] Hence we hold that the reliability standard of *Aguilar* and *Spinelli* was met.

Defendant says that since the identity of the apartment to be searched was not described with sufficient particularity, the affidavit and warrant were invalid. We do not agree.

Under the Constitution of the United States and the statutory law of Virginia it is essential to the validity of a search warrant that it describe with particularity the place to be searched. All that is required, however, is that the description be such that the officer charged with executing the search warrant can, with reasonable effort, ascertain and identify the place intended.

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[4] *Beck* v. *Ohio,* 379 U.S. 89, 96, 85 S.Ct. 223, 228, 13 L.Ed.2d 142 (1964).

It has been generally held that a search warrant directed against a multiple-occupancy structure is invalid if it fails to describe the particular sub-unit to be searched with sufficient definiteness to preclude search of other units located in the larger structure and occupied by innocent persons. But there are exceptions to the general rule. Even though a search warrant directed against a multiple-occupancy structure fails to describe the particular sub-unit to be searched, it will ordinarily not be held invalid where it adequately specifies the name of the occupant of the sub-unit against which it is directed and provides the searching officers with sufficient information to identify, without confusion or excessive effort, such apartment unit. See Annotation: "Search Warrant—Apartment or Room," 11 A.L.R.3d 1330, §§ 3 and 5, at 1333-39, 1340-41.

Here the affidavit and warrant gave the address of the apartment building and named the defendant as the person whose apartment was to be searched. The language used limited the search to the apartment unit occupied by the defendant. There were only five sub-units in the entire building, and we think the apartment of the defendant was sufficiently described for the searching officers to locate it with very little effort.

Lastly, the defendant contends that the mere showing of the presence of marijuana in an apartment, which was occupied by another, is not sufficient to sustain his conviction. There is no merit in this contention.

The evidence shows that the defendant voluntarily stated to the officers that the marijuana found in the apartment was his, and that Carole Speller, who was present at the time of the search and seizure, had nothing to do with it.

For the reasons stated, the judgment is

Affirmed.

Gordon, J., Concurring in result

RECORD NO. 7273

MELVIN LLOYD MANLEY, ALIAS, ETC.

v.

COMMONWEALTH OF VIRGINIA

GORDON, J., Concurring in Result

The majority concludes that an informer may be found credible or his information found reliable because he claimed to be an eyewitness or because his information was detailed. I do not so read the opinion of the Court and the concurring opinion of Mr. Justice White in *Spinelli* v. *United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d (1969). And I believe reason militates against such a conclusion.

I agree with the majority, however, that reliability in this case was sufficiently established by the informer's admission against interest. So I concur in affirming the judgment.